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# THE HOBBS ACT AFTER *LOPEZ*

**Abstract:** In 1995, in *United States v. Lopez*, the Supreme Court for the first time in five decades struck down a statute enacted by Congress under the Commerce Clause. In holding the Gun-Free School Zones Act of 1990 unconstitutional, the Court established that Congress' authority under the Commerce Clause is subject to outer limits, and that the Supreme Court will strike down federal statutes that obliterate the distinction between what is national and what is local. This Note reviews the Court's holding in *Lopez*, and argues in favor of the adoption of a two-step approach as the proper judicial inquiry regarding jurisdictional challenges to the Hobbs Act. The adoption of this two-step approach will ensure a return to the limited application of the Hobbs Act intended by Congress and will preserve our government's first principle—that the federal government is one of limited, enumerated powers.

## INTRODUCTION

By constitutional design, the federal government is one of limited or enumerated powers.<sup>1</sup> All other powers are reserved to the states or to the people.<sup>2</sup> Thus, the federal government must rely on a constitutional provision for each exercise of its power, including the power to make conduct criminal.<sup>3</sup> Among its expressed powers, the Constitution grants to the federal government the power to regulate interstate commerce.<sup>4</sup> As a result, Congress has frequently exercised its Commerce Clause power to enact federal criminal statutes, including the Hobbs Act.<sup>5</sup>

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<sup>1</sup> Richard L. McLeese, *Federal Criminal Jurisdiction*, ILL. INST. FOR CONTINUING LEGAL EDUC. 1, 2-3 (1997).

<sup>2</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>3</sup> See *United States v. Morrison*, 120 S. Ct. 1740, 1748 (2000); McLeese, *supra* note 1, at 3 (citing *United States v. Lopez*, 514 U.S. 549, 566 (1995)).

<sup>4</sup> See U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several States and with the Indian Tribes.").

<sup>5</sup> See *id.*; U.S. CONST. art. I, § 8, cl. 18; 18 U.S.C. § 1951 (1994). Congress has the power to "make all laws which shall be necessary and proper for carrying into execution" this enumerated power. U.S. CONST. art. I, § 8, cl. 18.

According to the Supreme Court of the United States, federal legislation authorized by the Commerce Clause falls into three categories.<sup>6</sup> First, Congress may regulate the use of channels of interstate commerce.<sup>7</sup> Second, Congress may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though they may come from only intrastate activity.<sup>8</sup> Finally, Congress may regulate activities having a substantial relation to interstate commerce; activities that substantially affect interstate commerce.<sup>9</sup>

Traditionally, the Supreme Court has been reluctant to strike down federal statutes enacted under Congress's Commerce Clause power.<sup>10</sup> In 1995, however, in *United States v. Lopez*, the Supreme Court for the first time in five decades struck down a statute enacted by Congress under the Commerce Clause.<sup>11</sup> In holding the Gun-Free School Zones Act of 1990 unconstitutional, the Court emphasized that Congress's authority under the Commerce Clause is subject to outer limits, and that the Supreme Court will strike down federal statutes that obliterate the distinction between what is national and what is local.<sup>12</sup>

The Court's holding in *Lopez* has stirred considerable debate about the proper role of the federal government, specifically in the area of criminal law.<sup>13</sup> On the one hand, some commentators suggest that the limits on Congress's power under the Commerce Clause articulated in *Lopez* are insignificant and not likely to constrain congressional action.<sup>14</sup> On the other hand, other commentators feel that the language of *Lopez* may restrict significantly the federal commerce power and fundamentally alter the balance of criminal authority between the states and the federal government in favor of the states.<sup>15</sup>

In particular, the Court's holding in *Lopez* has resulted in disagreement regarding the proper judicial inquiry for addressing con-

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<sup>6</sup> See *Morrison*, 120 S.Ct. at 1749; *Lopez*, 514 U.S. at 558-59.

<sup>7</sup> See *Morrison*, 120 S.Ct. at 1749; *Lopez*, 514 U.S. at 558.

<sup>8</sup> See *id.*

<sup>9</sup> See *Morrison*, 120 S.Ct. at 1749; *Lopez*, 514 U.S. at 559-60.

<sup>10</sup> See, e.g., Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L. REV. 674, 682 (1995); McLeese, *supra* note 1, at 7.

<sup>11</sup> See *Lopez*, 514 U.S. at 551.

<sup>12</sup> See *id.* at 557.

<sup>13</sup> See Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 117 (1997); Brandon Bigelow, Note, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913 (2000).

<sup>14</sup> See Merritt, *supra* note 10, at 676, 712.

<sup>15</sup> See St. Laurent, *supra* note 13, at 75.

stitutional challenges to the Hobbs Act.<sup>16</sup> Enacted in 1946, the Hobbs Act made robbery or extortion that obstructed or delayed commerce a federal offense punishable by up to twenty years imprisonment.<sup>17</sup> Like other federal criminal statutes, Congress relied on its commerce power as the jurisdictional base for the Hobbs Act.<sup>18</sup> Accordingly, for a defendant to be convicted under the Hobbs Act, the government must show that the conduct in question affected interstate commerce.<sup>19</sup> Uncertainty exists, however, regarding the degree to which an act of robbery or extortion must affect interstate commerce to allow for federal prosecution under the Hobbs Act.<sup>20</sup> Because of this uncertainty, many defendants are challenging the constitutionality of the Hobbs Act.<sup>21</sup>

In light of *Lopez* and the legislative history of the Hobbs Act, this *Note* argues in favor of the adoption of a two-step approach as the proper judicial inquiry regarding jurisdictional challenges to the Hobbs Act.<sup>22</sup> Part I discusses the *Lopez* decision and its possible significance in future cases involving challenges to federal legislation under the Commerce Clause.<sup>23</sup> Part II examines the Hobbs Act and its susceptibility to jurisdictional challenges after *Lopez*.<sup>24</sup> Part III reviews recent United States Court of Appeals' challenges to the jurisdictional element of the Hobbs Act.<sup>25</sup> Finally, applying a two-step approach to jurisdictional challenges to the Hobbs Act, this *Note* argues for a return to the limited application of the Hobbs Act originally intended by Congress.<sup>26</sup>

### I. UNITED STATES V. LOPEZ

In 1995, in *United States v. Lopez*, the Supreme Court held that a federal law prohibiting the possession of handguns near schools was unconstitutional.<sup>27</sup> The defendant, a Texas high school student, arrived at school carrying a concealed .38-caliber handgun and five bul-

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<sup>16</sup> See 18 U.S.C. § 1951 (1994); see also *infra* notes 93-95 and accompanying text.

<sup>17</sup> 18 U.S.C. § 1951.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *infra* notes 93-95 and accompanying text.

<sup>21</sup> See *infra* notes 96-157 and accompanying text.

<sup>22</sup> See *infra* notes 158-180 and accompanying text.

<sup>23</sup> See *infra* notes 27-55 and accompanying text.

<sup>24</sup> See *infra* notes 56-92 and accompanying text.

<sup>25</sup> See *infra* notes 93-157 and accompanying text.

<sup>26</sup> See *infra* notes 158-214 and accompanying text.

<sup>27</sup> See *Lopez*, 514 U.S. at 551.

lets.<sup>28</sup> Although the student was arrested and charged under state law, those charges were dropped after he was charged with violating the Gun-Free School Zones Act of 1990 ("1990 Act"), which made it a federal offense for any individual knowingly to possess a firearm in a school zone.<sup>29</sup> The student was convicted in the United States District Court for the Western District of Texas and sentenced to six months of imprisonment.<sup>30</sup> The Court of Appeals for the Fifth Circuit reversed the conviction on the grounds that the 1990 Act exceeded Congress's power to legislate under the Commerce Clause.<sup>31</sup>

The Supreme Court upheld the decision of the Fifth Circuit on the same grounds.<sup>32</sup> After reviewing the history of Congress's Commerce Clause power and the three traditional categories of federal legislation, the Court held that if the Act was to be sustained as a valid exercise of the Commerce Clause, it must be under the third category of activity that Congress may regulate – activities having a substantial relation to interstate commerce or activities that substantially affect interstate commerce.<sup>33</sup> The Court held that the 1990 Act exceeded the authority of Congress to regulate activity under this "substantial effects" prong of the Commerce Clause power because it neither regulated a commercial activity substantially related to commerce nor did the 1990 Act contain a requirement that the defendant's possession of a handgun in a school zone have a substantial affect on interstate commerce.<sup>34</sup>

The Court held that the regulation of gun possession in a school zone did not substantially affect interstate commerce because the statute was not a smaller part of a larger regulation of economic activity that would be undercut unless intrastate activities were regulated.<sup>35</sup> Thus, the Court reasoned that the statute could not be sustained under Supreme Court precedent that upheld regulations of activities that arose out of or were connected with a commercial transaction

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.*; 18 U.S.C. § 922 (q) (1) (A) (Supp. V 1998).

<sup>30</sup> *See Lopez*, 514 U.S. at 552.

<sup>31</sup> *See id.*

<sup>32</sup> *See Lopez*, 514 U.S. at 551.

<sup>33</sup> *See id.* at 559. The majority in *Lopez* held that the statute could not be justified as a regulation by which Congress sought to protect an instrumentality of interstate commerce or an article or person in interstate commerce (second prong). *See id.* at 559. However, in his dissent, Justice Stevens argued that guns are both articles of commerce and articles that can be used to restrain commerce, and therefore, under the second prong, Congress has the power to regulate possession of handguns. *See id.* at 602–03 (Stevens, J., dissenting).

<sup>34</sup> *See Lopez*, 514 U.S. at 551, 559–60.

<sup>35</sup> *See id.* at 561.

and, viewed in the aggregate, substantially affected interstate commerce.<sup>36</sup> The Court explained that when such commercial activity is regulated, the *de minimis* character of individual instances of the activity is of no consequence, and the aggregate effect of the class of activity may be considered in determining the validity of the federal regulation under the Commerce Clause.<sup>37</sup> Although the determination of whether intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty, the Court in *Lopez* held that possession of a handgun in a school zone did not fall on the commercial side of the line.<sup>38</sup>

In holding that the regulated activity in question was not commercial in nature, the Court emphasized the complete lack of congressional findings that possession of a handgun in a school zone substantially affected interstate commerce.<sup>39</sup> Although the Court conceded that formal congressional findings are not required, the Court reasoned that such findings could assist in evaluating the legislative judgment that an activity substantially affects interstate commerce, even when no such substantial effect is visible to the naked eye.<sup>40</sup> In the absence of congressional findings or a clear substantial effect on interstate commerce, the Court was unwilling to consider the possession of a handgun to be a commercial activity.<sup>41</sup>

The Court further supported its holding by emphasizing that the 1990 Act was a criminal statute and that states possess primary authority for defining and enforcing criminal law.<sup>42</sup> The court reasoned that

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<sup>36</sup> See *id.*; see also *Morrison*, 120 S.Ct. at 1750–51 (stating that while the Court need not at the present time adopt a categorical rule against aggregating the effects of any noneconomic activity, the Court has thus far upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature). In *Morrison*, the Court struck down the federal civil remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981 (1994), because Congress lacked the authority under both the Commerce Clause and Section Five of the Fourteenth Amendment. See *Morrison*, 120 S. Ct. at 1799.

<sup>37</sup> See *id.* at 558 (citation omitted).

<sup>38</sup> See *Lopez*, 514 U.S. at 560, 566. But see *Lopez*, 514 U.S. at 619 (Breyer, J., dissenting) (arguing that Congress could rationally conclude that schools fall on the commercial side of the line).

<sup>39</sup> See *Lopez*, 514 U.S. at 562–63.

<sup>40</sup> See *id.* In *Morrison*, however, the Court stated that congressional findings alone are not sufficient to sustain the constitutionality of Commerce Clause legislation and that the Court must ultimately determine whether particular operations affect interstate commerce sufficiently to come under Congress's Commerce Clause power. See 120 S. Ct. at 1752.

<sup>41</sup> See *id.* at 561.

<sup>42</sup> See *id.* at 561 n.3. Although Congress has the power under the Commerce Clause to regulate commercial activities, and this power will at times affect areas of state sovereignty, that authority does not include the power to take over entire areas of traditional state con-

to allow federal regulation of all activity related to economic productivity would effectively obliterate the distinction between what is truly national and what is truly local.<sup>43</sup> The Court concluded that to "pile inference upon inference" to support the finding of a substantial effect on interstate commerce would convert congressional authority under the Commerce Clause to a general police power in violation of our federal system of government.<sup>44</sup>

Thus, the Court concluded that the activity regulated in *Lopez* was not commercial in nature.<sup>45</sup> Moreover, the regulation intruded upon an area of traditional state sovereignty.<sup>46</sup> Accordingly, the Court held that the government could not justify the exercise of its federal power based on the aggregate effect of violence in schools.<sup>47</sup>

In addition to the statute's lack of congressional findings and its intrusion into an area of traditional state sovereignty, the Court determined that the 1990 Act lacked an express jurisdictional element.<sup>48</sup> A jurisdictional element requires the government to prove as part of its case-in-chief that the offense in question had a substantial effect on interstate commerce and was, therefore, subject to the jurisdiction of the federal government.<sup>49</sup> In the absence of this jurisdictional element, the Court held that the 1990 Act did not regulate an activity that substantially affects interstate commerce.<sup>50</sup>

Thus, the Court established a two-step approach to determine the validity of federal statutes that are founded on the "substantial

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cern. See *Lopez*, 514 U.S. at 565-66; see also *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). For a historical review of the origin and development of state and federal criminal law, see Bigelow, *supra* note 13, at 913.

<sup>43</sup> See *Lopez*, 514 U.S. at 564, 567-68. The Court mentioned family law and criminal law as examples of areas of traditional state sovereignty. See *id.* at 564.

<sup>44</sup> See *id.* at 567-68.

<sup>45</sup> See *id.* at 561.

<sup>46</sup> See *id.* at 564.

<sup>47</sup> See *id.*

<sup>48</sup> See *Lopez*, 514 U.S. at 561-62. As one commentator put it, by failing to require federal prosecutors to satisfy any jurisdictional element, Congress almost dared the Court to find the statute unconstitutional. See Merritt, *supra* note 10, at 696. It is not clear, however, that statutes that regulate a commercial activity having a "substantial effect" on commerce require such an explicit jurisdictional element. See St. Laurent, *supra* note 13, at 83-84. Instead, the requirements of *Lopez* may be read disjunctively; either a regulation of commercial activity, or a jurisdictional element requiring case-by-case inquiry. See *id.*

<sup>49</sup> See *Lopez*, 514 U.S. at 561-62. An example of a jurisdictional element is the requirement in the Hobbs Act that the extortion or robbery "in any way or degree obstructs, delays, or affects commerce." 18 U.S.C. § 1951 (1994).

<sup>50</sup> See *Lopez*, 514 U.S. at 561.

effects" prong of Congress's Commerce Clause power.<sup>51</sup> First, courts must determine whether the statute is part of a larger regulation of economic activity that could be undercut unless intrastate activities are regulated.<sup>52</sup> In conducting this inquiry, courts should look to congressional findings to determine the effect an activity has on interstate commerce and determine whether the regulation intrudes on an area of traditional state sovereignty.<sup>53</sup> Second, if the statute is not part of a larger regulation of economic activity, courts must determine whether the statute includes a jurisdictional element that requires a case-by-case determination of whether the individual offense had a substantial effect on interstate commerce.<sup>54</sup> In *Lopez*, the Court struck down the 1990 Act because the statute failed both prongs of the inquiry.<sup>55</sup>

## II. THE HOBBS ACT

The Hobbs Act, enacted in 1946 as an amendment to the Anti-Racketeering Act of 1934 ("1934 Act"), makes it a federal offense to commit robbery or extortion that in any way or degree obstructs commerce.<sup>56</sup> To be convicted under the Hobbs Act, the government must prove that a defendant committed extortion or robbery, and that such action interfered with interstate commerce.<sup>57</sup> Because the Hobbs Act only amended the 1934 Act to include conduct by labor unions, the legislative history of both Acts is relevant.<sup>58</sup>

The legislative history of the 1934 Act is replete with evidence that Congress passed the 1934 Act to eliminate racketeering by organized gangs, which was found to have a substantial effect on interstate commerce.<sup>59</sup> The 1934 Act was first introduced in the Senate in response to a Senate Committee on Interstate Commerce investigation of rackets and racketeering.<sup>60</sup> In its report, the Committee on Interstate Commerce adopted an official definition of racketeering as being "an organized conspiracy to commit the crimes of extortion or

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<sup>51</sup> See *id.* at 559-62.

<sup>52</sup> See *id.* at 559-61.

<sup>53</sup> See *supra* notes 39-47 and accompanying text.

<sup>54</sup> See *Lopez*, 514 U.S. at 561-62.

<sup>55</sup> See *id.* at 567-68.

<sup>56</sup> See 18 U.S.C. § 1951 (1994).

<sup>57</sup> See *id.*; *United States v. Green*, 350 U.S. 415, 416-17 (1956).

<sup>58</sup> See *United States v. Staszczuk*, 517 F.2d 53, 56-57 (7th Cir. 1975) (en banc).

<sup>59</sup> See *United States v. Local 807*, 118 F.2d 684, 687-88 (2d Cir. 1941) *aff'd*, *United States v. Local 807*, 315 U.S. 521, 539 (1942).

<sup>60</sup> See *Local 807*, 315 U.S. at 528-29, *citing* 78 CONG. REC. 457, (1934); See *id.* (*citing* S. Res. 74, 73rd Cong. (1934) (enacted)).



coercion, or attempts to commit extortion or coercion."<sup>61</sup> The report found that thousands of businessmen were being compelled to pay "dues" for "protection" from gangsters allied with those affording protection.<sup>62</sup> The report also pointed out that rackets involving the "hijacking" of trucks used to transport merchandise in interstate commerce and other acts perpetuated in the field of transportation were the most common.<sup>63</sup>

After passage by the Senate, the bill was redrafted by officials of the Department of Justice to include a provision preserving the rights of bona fide labor organizations.<sup>64</sup> In its support of the bill, the House Committee on the Judiciary relied upon a letter from the Attorney General to the Committee which stated that the 1934 Act was intended to make unlawful racketeering "in connection with price fixing and economic extortion directed by professional gangsters."<sup>65</sup> Thereafter, while the bill awaited the signature of the President, Senator Copeland, the sponsor of the bill in Congress, submitted a report in which he referred to the bill as one intended to "render more difficult the activities of predatory criminal gangs."<sup>66</sup> Thus, the elimination of racketeering by professional gangsters was the aim of the 1934 Act.<sup>67</sup>

The Hobbs Act was passed as an amendment to the 1934 Act in response to the Supreme Court decision in *United States v. Local 807*.<sup>68</sup> There, the Court held that, based on the proviso of the 1934 Act that preserved the rights of bona fide labor organizations, labor union activities were not subject to prosecution under the 1934 Act.<sup>69</sup> The Court reasoned that it was not the intent of Congress when it passed the 1934 Act to subject even militant labor union activities to federal prosecution.<sup>70</sup>

In arguing for the adoption of the Hobbs Act, Congressman Hobbs, the sponsor of the Act, emphasized that the 1934 Act was be-

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<sup>61</sup> See S. REP. NO. 75-1189, at 3 (1935).

<sup>62</sup> See *id.* at 9.

<sup>63</sup> See *id.* at 21-23.

<sup>64</sup> See *Local 807*, 315 U.S. at 529 (citing 78 CONG. REC. 5859 (1934)).

<sup>65</sup> See *id.* at 529-30 (citing H.R. REP. NO. 73-1833, at 2 (1934)).

<sup>66</sup> See *id.* (citing S. REP. NO. 73-1440, at 1 (1934)).

<sup>67</sup> See *Local 807*, 315 U.S. at 530.

<sup>68</sup> See H.R. REP. NO. 78-66, at 1-2 (1943); *Local 807*, 315 U.S. at 521.

<sup>69</sup> See *Local 807*, 315 U.S. at 531.

<sup>70</sup> See *id.* The Court in *Local 807* held that labor union activities were excluded from prosecution under the Hobbs Act although the defendants had been found guilty of committing highway robberies and, at a rate of 1000 per day, such robberies were having a considerable impact on interstate commerce. See *Local 807*, 315 U.S. at 530.

ing amended to address highway robbery by organized labor unions and was intended to protect individuals and goods in interstate commerce.<sup>71</sup> Additional testimony during the debate in the House of Representatives clearly establishes that the Hobbs Act was passed to protect individuals "trying to deliver food into the various big cities in our nation" and those "who feel they have a right to drive down . . . public highways and streets . . ."<sup>72</sup> According to Mr. Hobbs, the "sole and simple purpose" of the Hobbs Act is to protect interstate commerce and "free the highways and streets of this country of robbers."<sup>73</sup> Thus, the Hobbs Act was originally a subject matter specific statute that applied only to actions of organized gangs, and, like other subject matter specific statutes, was passed by Congress only after findings that the specific type of crime so addressed presented a national problem.<sup>74</sup> This interpretation of the Hobbs Act is further supported by the initial and long held position of the Justice Department that the robbery provision of the Act was to be utilized only in instances "involving organized crime, gang activity, or wide-ranging criminal activity."<sup>75</sup>

In 1956, in *United States v. Green*, the Supreme Court held that the Hobbs Act was constitutional and that Congress had the authority to enact the legislation under its Commerce Clause power.<sup>76</sup> In *Green*, union representatives were found guilty after a jury trial of extortion under the Hobbs Act for attempting to extort money from an employer.<sup>77</sup> The United States District Court for the Southern District of Illinois, however, arrested the judgment, holding that the Hobbs Act exceeded the constitutional limits of the Commerce Clause.<sup>78</sup> On direct appeal, the Supreme Court held that extortion upon threat of violence by organized union members that affects interstate com-

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<sup>71</sup> See 91 CONG. REC. 11,912 (1945).

<sup>72</sup> See *id.* at 908 (statement by Mr. Vursell). Mr. Jennings stated "we are just undertaking to draw a straight line . . . between the right which belongs to the man on his legitimate mission to market and the misconduct of a robber . . . on a public thoroughfare of this country." See *id.* at 912. Mr. Rivers asserted "no longer will they obstruct and retard . . . the orderly transportation of persons and property in interstate or foreign commerce." See *id.* at 917.

<sup>73</sup> See *id.* at 912 (statement by Mr. Hobbs).

<sup>74</sup> See *supra* notes 59-73 and accompanying text; see also St. Laurent, *supra* note 13, at 62.

<sup>75</sup> See McCleesc, *supra* note 1 at 14-15, (citing DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, tit. 9, § 131.040).

<sup>76</sup> See *Green*, 350 U.S. at 420-21.

<sup>77</sup> See *id.* at 416.

<sup>78</sup> See *id.*

merce falls within the terms of the Act and that the Act is within Congress's Commerce Clause powers.<sup>79</sup> The court, however, held that the record did not contain evidence showing that the extortion affected interstate commerce, and remanded the case to the district court for a determination of whether the jurisdictional element of the Hobbs Act was satisfied.<sup>80</sup>

Likewise, in 1975, in *United States v. Staszczuk*, the United States Court of Appeals for the Seventh Circuit held that the jurisdictional reach of the Hobbs Act is co-extensive with the power of Congress under the Commerce Clause.<sup>81</sup> In *Staszczuk*, the defendant, a local Alderman, was found guilty after a jury trial in the United States District Court for the Northern District of Illinois of violating the Hobbs Act.<sup>82</sup> The defendant had received \$3000 to support a zoning change authorizing the construction of a new building that was never constructed.<sup>83</sup> The defendant appealed the conviction, claiming that because the building was never constructed there was no evidence that either the zoning change or the payment had any effect on interstate commerce.<sup>84</sup>

The Court of Appeals for the Seventh Circuit, sitting *en banc*, held that the extortion fell within the scope of the Hobbs Act.<sup>85</sup> In upholding the conviction, the court observed that the primary purpose of the Commerce Clause was to secure freedom of trade.<sup>86</sup> The court determined that, because the Hobbs Act's purpose "unambiguously parallels" the purpose of the Commerce Clause, the Act must receive an expansive construction to allow Congress to exercise its full power.<sup>87</sup> The Court of Appeals reasoned that, because Congress exercised its full power under the Commerce Clause in enacting the statute, Congress intended the Act to cover all restraint of any commerce within the scope of the Commerce Clause.<sup>88</sup> Therefore, the court held that no actual interference with interstate commerce was required and a realistic probability that an extortionate transaction will have

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<sup>79</sup> See *id.* at 420-21.

<sup>80</sup> See *id.* at 421.

<sup>81</sup> See *United States v. Staszczuk*, 517 F.2d 53, 58 (7th Cir. 1975) (*en banc*).

<sup>82</sup> See *id.* at 56.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 55.

<sup>85</sup> See *id.* at 56, 59.

<sup>86</sup> See *Staszczuk*, 517 F.2d at 58.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* at 59.

some effect on interstate commerce was sufficient to uphold a conviction under the Act.<sup>89</sup>

Since *Green* and *Staszczuk*, the lower courts have expanded the Hobbs Act to permit the federal government to prosecute virtually any economically motivated crime.<sup>90</sup> For example, individuals not related to organized gangs or associations have been convicted under the Hobbs Act for purely local and isolated robberies of retail establishments, despite the minimal effect the individual robberies had on interstate commerce.<sup>91</sup> Because the Hobbs Act has been applied to such a variety of economically motivated crimes, many commentators now consider it a non-subject matter specific statute, the application of which is no longer limited to the protection of persons or goods in interstate commerce or the prosecution of robbery and extortion by organized gangs.<sup>92</sup>

### III. POST-LOPEZ CHALLENGES TO THE JURISDICTIONAL ELEMENT OF THE HOBBS ACT

Despite the majority opinion in *Lopez*, lower federal courts have generally rejected jurisdictional challenges to the Hobbs Act, even where the connection to interstate commerce was minimal or non-existent.<sup>93</sup> In finding the jurisdictional element of the Hobbs Act to be satisfied, lower courts commonly have considered the potential aggregate effect of an entire class of activity rather than determining whether the regulated activity is commercial in nature, or whether defendant's conduct alone has had a substantial effect on commerce.<sup>94</sup> Nevertheless, *Lopez* has produced considerable uncertainty in the lower courts regarding the proper judicial inquiry for challenges to the jurisdictional element of the Hobbs Act.<sup>95</sup>

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<sup>89</sup> See *id.* at 59, 60.

<sup>90</sup> See St. Laurent, *supra* note 13, at 62.

<sup>91</sup> See, e.g., *United States v. Wiseman*, 172 F.3d 1196, 1201 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 211 (1999); *United States v. Alfonso*, 143 F.3d 772, 773-74 (2d Cir. 1998); *United States v. Romero*, 122 F.3d 1334, 1335-36 (10th Cir. 1997), *cert. denied*, 523 U.S. 1025 (1998).

<sup>92</sup> See St. Laurent, *supra* note 13, at 62. "Non-subject matter specific" statutes regulate a broad range of conduct and stand in contrast to "subject matter specific" statutes that govern a specific market or property that Congress wishes to protect. See *id.*; *United States v. Hickman*, 179 F.3d 230, 235-36 (5th Cir. 1999) (*en banc*) (Higginbotham, J., dissenting), *cert. denied*, 120 S. Ct. 2195 (2000).

<sup>93</sup> See *infra* notes 96-155 and accompanying text; St. Laurent, *supra* note 13, at 63, 88.

<sup>94</sup> See *infra* notes 96-155 and accompanying text; St. Laurent, *supra* note 13, at 63, 88.

<sup>95</sup> See St. Laurent, *supra* note 13, at 84-85, 87-88, 92.

In 1999, in *United States v. Arena*, the United States Court of Appeals for the Second Circuit upheld the conviction of two defendants under the Hobbs Act for extortion and conspiracy to commit extortion.<sup>96</sup> There, defendants committed attacks on medical facilities that provided reproductive health services by pouring butyric acid on the premises.<sup>97</sup> As a result of the attacks, the facilities were forced to close for several days and undertake a costly cleanup effort.<sup>98</sup> One of the medical facilities realized a reduction in gross receipts of \$18,000 to \$20,000 per month over a three-month period because of the attack.<sup>99</sup>

The Second Circuit held that this impact on commerce was sufficient to uphold the conviction under the Hobbs Act.<sup>100</sup> The court reasoned that, because the Hobbs Act prohibits specified conduct if it affects commerce "in any way or degree," the burden of proving a nexus to interstate commerce is "*de minimis*."<sup>101</sup> Thus, the Court held that "*Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution" for extortion and the government need only demonstrate a *de minimis* effect upon commerce.<sup>102</sup>

Similarly, in 1995, in *United States v. Stillo*, the United States Court of Appeals for the Seventh Circuit upheld the conviction of a defendant under the Hobbs Act for conspiracy to commit extortion.<sup>103</sup> There, the defendant, a local judge, was convicted for conspiring to accept a bribe from a law firm to fix a misdemeanor case.<sup>104</sup>

In upholding the conviction, the Seventh Circuit found that the burden on the government to meet the jurisdictional element of the Hobbs Act was slight or *de minimis*.<sup>105</sup> The court held that the jurisdictional element of the Hobbs Act was satisfied because, had the bribe been accepted, the assets of the payer would have been depleted, and therefore, an effect on interstate commerce would have resulted.<sup>106</sup> The court reasoned that, under the "depletion of assets theory," the law firm that was to pay the bribe had previously pur-

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<sup>96</sup> See *United States v. Arena*, 180 F.3d 380, 385 (2d Cir. 1999).

<sup>97</sup> See *id.* at 385-86. Butyric acid is a hazardous liquid that emits a powerful, rancid odor. See *id.* at 385.

<sup>98</sup> See *id.* at 387, 388.

<sup>99</sup> See *id.* at 391.

<sup>100</sup> See *id.*

<sup>101</sup> See *Arena*, 180 F.3d at 389-90 (citation omitted).

<sup>102</sup> See *id.* (quotation omitted).

<sup>103</sup> See 57 F.3d 553, 555 (7th Cir. 1995).

<sup>104</sup> See *id.* at 555, 558.

<sup>105</sup> See *id.* at 558.

<sup>106</sup> See *id.*

chased items in interstate commerce and its ability to make additional purchases of items in interstate commerce would have been diminished had the bribes been accepted.<sup>107</sup> Thus, the Seventh Circuit held that extortion involving commercial actors was economic activity, and the express jurisdictional element of the Hobbs Act ensured case-by-case determination of a *de minimis* effect on interstate commerce.<sup>108</sup>

Also, in 1996, in *United States v. Atcheson*, the United States Court of Appeals for the Ninth Circuit upheld the conviction of defendants under the Hobbs Act for robbery and extortion.<sup>109</sup> There, defendants had lured local businessmen to a vacant building, kidnapped them and then attempted to gain access to their bank accounts using their ATM cards.<sup>110</sup>

In upholding the conviction, the Ninth Circuit concluded that the "substantial effects" test of *Lopez* did not apply to the Hobbs Act.<sup>111</sup> The court reasoned that the "substantial effects" test only applies to regulations of non-commercial activities or regulations that do not contain a jurisdictional requirement that the activity be connected in any way to interstate commerce.<sup>112</sup> Further, the court found that, because the Hobbs Act is concerned solely with interstate, rather than intrastate activities, *Lopez's* "substantial effects" test was not applicable.<sup>113</sup> The court held that the theft of out-of-state credit cards, placement of interstate telephone calls and the depletion of assets resulting from defendants' actions were sufficient to prove a "direct" connection with interstate commerce.<sup>114</sup> Therefore, the court concluded the *de minimis* effect of the defendants' actions was sufficient to uphold the conviction under the Hobbs Act.<sup>115</sup>

Likewise, in 1999, in *United States v. Wiseman*, the United States Court of Appeals for the Tenth Circuit upheld the conviction under the Hobbs Act of a defendant for a series of robberies of grocery

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<sup>107</sup> See *id.* The "depletion of assets theory" suggests that a payment of a bribe depletes the assets of the person paying the bribe. Accordingly, the payer has fewer assets to purchase goods in interstate commerce. Thus, under the theory, any bribe paid by an individual who has previously purchased items in interstate commerce affects interstate commerce and federal jurisdiction is appropriate. See *id.*

<sup>108</sup> See *Stillo*, 57 F.3d at 558 n.2.

<sup>109</sup> See 94 F.3d 1237, 1239-40 (9th Cir. 1996).

<sup>110</sup> See *id.* at 1240.

<sup>111</sup> See *id.* at 1242.

<sup>112</sup> See *id.* at 1241.

<sup>113</sup> See *id.* at 1242.

<sup>114</sup> See *Atcheson*, 94 F.3d at 1242-43.

<sup>115</sup> See *id.*

stores in New Mexico.<sup>116</sup> There, the defendant had robbed a total of six grocery stores, taking amounts ranging from \$2500 to \$20,000.<sup>117</sup>

In upholding the conviction under the Hobbs Act, the court first determined that the distinction between violations of the Hobbs Act and common law robbery was that a violation of the Hobbs Act requires some nexus with interstate commerce.<sup>118</sup> Moreover, the court held that only a de minimis effect on commerce must be shown to satisfy this jurisdictional requirement.<sup>119</sup> Relying on the depletion of assets theory, the court reasoned that the jurisdictional element of the Hobbs Act was satisfied because wholesalers from whom the victimized stores purchased products provided goods that originated in several other states.<sup>120</sup> According to the court, the conviction was valid because a jury may infer from a showing that business assets were depleted that interstate commerce was affected to some minimal degree; the stolen money could have been used to purchase goods in interstate commerce.<sup>121</sup> Thus, the court upheld the conviction of defendant under the Hobbs Act.<sup>122</sup>

Applying a different judicial inquiry, in 1997, in *United States v. Harrington*, the United States Court of Appeals for the District of Columbia Circuit upheld a defendant's conviction under the Hobbs Act for aiding and abetting a robbery.<sup>123</sup> The defendant assisted in the robbery of a local Roy Rogers restaurant in the District of Columbia that resulted in the restaurant losing \$32 in cash and up to \$1000 in lost revenue due to its forced closing after the robbery.<sup>124</sup> The defendant challenged the conviction, arguing that the evidence was insufficient to satisfy the jurisdictional element of the Hobbs Act.<sup>125</sup>

The D.C. Circuit did not address the viability of the Hobbs Act as a regulation of commercial activity related to interstate commerce, and instead addressed only the jurisdictional element of the statute.<sup>126</sup>

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<sup>116</sup> See 172 F.3d at 1201, 1220.

<sup>117</sup> See *id.* at 1201-03.

<sup>118</sup> See *id.* at 1214.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *Wiseman*, 172 F.3d at 1214-15.

<sup>122</sup> See *id.* at 1220.

<sup>123</sup> See 108 F.3d 1460, 1463 (D.C. Cir. 1997).

<sup>124</sup> See *id.* at 1468.

<sup>125</sup> See *id.* at 1464. The government acknowledged that it might have pled Hobbs Act jurisdiction based on Congress's plenary powers over the District of Columbia, but did not seek affirmation on this rationale because the jury was not instructed accordingly. See *id.* at 1464 n.1.

<sup>126</sup> See *id.* at 1465, 1466.

In upholding the conviction under the Hobbs Act, the court stated that the proper question when reviewing a challenge to the jurisdictional element of the Hobbs Act is whether the evidence was sufficient to show an "explicit" and "concrete" effect on interstate commerce.<sup>127</sup> The court rejected the claim that the government must show a "substantial effect" on interstate commerce.<sup>128</sup> Rather the court reasoned that *Lopez* requires a showing of a "substantial effect" on interstate commerce only when applied to purely intrastate commercial activities.<sup>129</sup>

The D.C. Circuit held that the robbery in this case interfered with transactions that were not "purely intrastate" but rather constituted interstate commerce.<sup>130</sup> The court determined that the removal of \$1000 from an interstate bank transfer was sufficient to establish a "concrete" and "explicit" effect on interstate commerce because the money would have partially financed the purchase of soda from Georgia and North Carolina, chicken from West Virginia and french fries from Idaho.<sup>131</sup> In finding a sufficient nexus with interstate commerce, the court stated that it was not relying on the aggregate effect of any class of activity because to do so would be inappropriate where the nexus between a federal statute and interstate commerce must be proven in each application of the statute.<sup>132</sup> Moreover, the court stated that the robbery in question had more than a de minimis effect on interstate commerce because a "concrete" and "explicit" effect had been shown.<sup>133</sup>

Most significantly, however, in 1999, in *United States v. Hickman*, by reason of an equally divided *en banc* court, the United States Court of Appeals for the Fifth Circuit upheld the conviction of several robbery defendants under the Hobbs Act.<sup>134</sup> There, the defendants committed a total of seven robberies of local businesses.<sup>135</sup> The greatest amount of money taken in any of the robberies was \$2000.<sup>136</sup> In the dissenting

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<sup>127</sup> See *id.* at 1465 (citing *Lopez*, 514 U.S. at 549).

<sup>128</sup> See *Harrington*, 108 F.3d at 1465.

<sup>129</sup> See *id.* at 1466 (citation omitted).

<sup>130</sup> See *id.* at 1466.

<sup>131</sup> See *id.* at 1466, 1468-69.

<sup>132</sup> See *id.* at 1470.

<sup>133</sup> See *Harrington*, 108 F.3d at 1465, 1470. The court's rejection of the aggregation principle and the de minimis standard represents a significant narrowing of pre-*Lopez* commerce clause jurisprudence. See Merritt, *supra* note 10, at 678-79.

<sup>134</sup> See 179 F.3d at 231. The conviction was upheld because the court was equally divided and only the dissenting justices authored an opinion. See *id.*

<sup>135</sup> See *id.* at 230, 231 (Higginbotham, J., dissenting).

<sup>136</sup> See *id.* (Higginbotham, J., dissenting).



opinion, eight judges argued that the conviction of the defendants under the Hobbs Act exceeded Congress's authority under the Commerce Clause.<sup>137</sup>

According to the dissent, the convictions could only be upheld under the third "substantial effect" prong of the Commerce Clause.<sup>138</sup> In determining what constitutes a "substantial effect" on interstate commerce, the dissenters argued for the adoption of a rule that, in their opinion, was more in line with the Supreme Court's holding in *Lopez*.<sup>139</sup> The dissent asserted that regulation of commercial activities or activities that are part of a broader scheme of economic regulation should be upheld under the substantial effects prong of Congress's commerce power.<sup>140</sup> In such cases, the de minimis effect on interstate commerce of the individual instances of such activities is immaterial because the broader scheme of regulation would be undercut if individual instances of the activity were not aggregated.<sup>141</sup> The dissenters argued, however, that noncommercial activities having no interactive effects on other instances of such activity should not be aggregated; the individual instances of the activity must themselves have a substantial effect on interstate commerce.<sup>142</sup>

Applying this analysis, the dissent first argued that the Hobbs Act is not a regulation of commercial activity because it does not regulate any relevant interstate economic market, nor does robbery fit into the conventional understanding of commerce.<sup>143</sup> The Hobbs Act neither targets any class of product, process or market, nor is it limited to the

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<sup>137</sup> See *id.* (Higginbotham, J., dissenting).

<sup>138</sup> See *id.* at 232 (Higginbotham, J., dissenting). The dissent rejected the argument that a conviction under the Hobbs Act for the robbery of a store may be upheld under the second "person or things in commerce" prong of the Commerce Clause power because a store is not an instrumentality of commerce and is not itself in interstate commerce. See *id.* at 241 (Higginbotham, J., dissenting). The dissent viewed the second prong as encompassing only vehicles that move in interstate commerce and people or goods traveling in interstate commerce. See *id.* (Higginbotham, J., dissenting).

<sup>139</sup> See *Hickman*, 179 F.3d at 234-35 (Higginbotham J., dissenting).

<sup>140</sup> See *id.* (Higginbotham, J., dissenting).

<sup>141</sup> See *id.* at 235 (Higginbotham, J., dissenting). The dissent cited the *Lopez* reliance upon *Wickard v. Filburn*, 317 U.S. 111 (1942) as a compelling example of the recommended rule because the activity in *Wickard* was commercial and had interactive effects on others in the market. See *Hickman*, 179 F.3d at 235 (Higginbotham, J., dissenting).

<sup>142</sup> See *id.* at 234-35 (Higginbotham, J., dissenting).

<sup>143</sup> See *id.* at 231, 237-38 (Higginbotham, J., dissenting). Commerce has grown to include selling, buying, bartering, manufacturing, agriculture and services, as well as transporting for those purposes. See *id.* at 237-38 (Higginbotham, J., dissenting). There is no basis for including robbery in economic activity. See *id.* (Higginbotham, J., dissenting).

protection of commercial victims.<sup>144</sup> Instead, the Hobbs Act facially applies to any robbery, or attempted robbery, of any person or entity.<sup>145</sup> Also, the dissent asserted that the legislative record is void of any evidence of congressional findings that retail robberies have a substantial effect on interstate commerce, and therefore, there is no rational basis for concluding that Congress was concerned with local robberies of retail stores.<sup>146</sup> The dissenters argued, moreover, that the conclusion that robbery is not an economic activity is buttressed by the fact that robbery is a traditional target of the police power, and thus falls within an area of traditional state sovereignty.<sup>147</sup>

Further, the dissent argued that robbery convictions should not be upheld based on the need for congressional regulation to reach individual instances of a class of activity.<sup>148</sup> Although Congress may regulate interstate activity as part of a broader scheme of economic regulation, the dissenters argued that individual acts cannot be aggregated if their effects on commerce are causally independent of one another.<sup>149</sup> Only where the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur is there an interactive effect that would justify upholding the application of the regulation despite the de minimis effect of each individual instance.<sup>150</sup> According to the dissent, Congress has not identified any rational basis for aggregation that would entitle the federal government to prosecute purely local robberies under the Hobbs Act, nor is any rational basis evident.<sup>151</sup> Instead, Congress merely has identified a class of objectionable conduct, and has sought to regulate such conduct as far as possible.<sup>152</sup>

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<sup>144</sup> See *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting).

<sup>145</sup> See *id.* (Higginbotham, J., dissenting).

<sup>146</sup> See *id.* at 244 (DeMoss, J., specially dissenting). The legislative history of the Hobbs Act, however, does show that Congress passed the statute to combat highway robberies that were having a substantial effect on interstate commerce. See *id.* (DeMoss, J., specially dissenting). The regulation of such highway robberies, unlike robberies of local retail establishments, fits comfortably within the second prong of Congress's Commerce Clause power. See *id.* (DeMoss, J., specially dissenting).

<sup>147</sup> See *id.* at 238 (Higginbotham, J., dissenting). Robbery is an area of traditional state sovereignty under the police power, and where there is ambiguity whether an activity is economic, determining whether the activity falls within the police power of the states is an informing means of resolving the ambiguity. See *id.* (Higginbotham, J., dissenting).

<sup>148</sup> See *id.* at 233 (Higginbotham, J., dissenting).

<sup>149</sup> See *Hickman*, 179 F.3d at 231, 233 (Higginbotham, J., dissenting).

<sup>150</sup> See *id.* at 233 (Higginbotham, J., dissenting).

<sup>151</sup> See *id.* at 242 (Higginbotham, J., dissenting).

<sup>152</sup> See *id.* at 235-36.

Accordingly, the dissent argued that to apply the Hobbs Act to a purely local robbery, it must be shown that the individual robbery substantially affected interstate commerce.<sup>153</sup> To allow for aggregation in the absence of commercial activity or a particular regulatory scheme would sustain federal jurisdiction of almost all crimes, and thus, conflict with *Lopez*.<sup>154</sup> In the opinion of the dissenting justices, the individual robberies in *Hickman* did not have a substantial effect on interstate commerce, and therefore, the convictions under the Hobbs Act should have been overruled.<sup>155</sup>

As illustrated in the above Circuit Court of Appeals' decisions, significant uncertainty exists regarding the proper judicial inquiry for jurisdictional challenges to the Hobbs Act.<sup>156</sup> Accordingly, no uniform approach has evolved in the lower courts, and direct consideration of the issue by the Supreme Court appears necessary.<sup>157</sup>

#### IV. A TWO-STEP APPROACH

The overriding concern of the Court in *Lopez* was that the rationales proffered by the Government in support of the Gun-Free School Zones Act offered no limitation on Congress's power under the Commerce Clause.<sup>158</sup> According to the Court, the enumeration of powers in the Commerce Clause presupposes something not enumerated, and when Congress attempts to alter the federal balance by overstepping its enumerated powers, it is the Court's responsibility to intervene.<sup>159</sup> Although many commentators argue that *Lopez* is a narrow decision that will invalidate few federal statutes, the Court's wariness of regulatory rationales that encompass all forms of human behavior or intrude on areas of traditional state sovereignty evinces intent to enforce real limits on the Commerce Clause power.<sup>160</sup> In particular, the two-part inquiry adopted in *Lopez* should serve to limit the application of federal criminal laws, including the Hobbs Act, that

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<sup>153</sup> See *id.* at 240-41 (Higginbotham, J., dissenting).

<sup>154</sup> See *Hickman*, 179 F.3d at 231-32 (Higginbotham, J., dissenting).

<sup>155</sup> See *id.* at 231 (Higginbotham, J., dissenting).

<sup>156</sup> See *supra* notes 96-155 and accompanying text.

<sup>157</sup> See St. Laurent, *supra* note 13, at 107.

<sup>158</sup> See *Lopez*, 514 U.S. at 564.

<sup>159</sup> See *id.* at 552; see also *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring); Merritt, *supra* note 10, at 685-86.

<sup>160</sup> See *Lopez*, 514 U.S. at 564; Merritt, *supra* note 10, at 712; St. Laurent, *supra* note 13, at 81.

are based on the "substantial effects" prong of Congress's Commerce Clause power.<sup>161</sup>

Under the two-step approach adopted in *Lopez* and advocated by the dissent in *Hickman*, when addressing jurisdictional challenges to federal statutes based on the "substantial affects" prong of Congress's Commerce Clause power, lower courts first should determine whether the regulated activity is commercial in nature.<sup>162</sup> Specifically, lower courts must determine whether the regulated activity is part of a larger regulation of economic activity that would be undercut if individual instances of the activity were not regulated.<sup>163</sup>

In making this determination, lower courts should review the legislative history of the federal statute in order to evaluate the legislative judgment that an activity substantially effects interstate commerce.<sup>164</sup> Also, in determining whether the regulated activity is commercial in nature, lower courts should consider whether the federal statute intrudes on an area of traditional state sovereignty such as family law, criminal law or education.<sup>165</sup> If, under these considerations, the regulated activity is found to be commercial in nature, the *de minimis* character of the individual instances of the activity is of no consequence, and the aggregate effect of the class of activity may be considered in determining the validity of federal regulation under the Commerce Clause.<sup>166</sup>

If, however, the regulated activity is not commercial in nature, under the second part of the inquiry adopted in *Lopez* and advocated by the dissent in *Hickman*, the lower courts should determine whether the federal statute includes a jurisdictional element.<sup>167</sup> For those federal statutes that include a jurisdictional element, and are therefore facially valid, the lower courts must determine whether the statute, as applied, is constitutional; whether the offense in question actually had a substantial effect on interstate commerce.<sup>168</sup>

Applying this two-part inquiry to the Hobbs Act, as advocated by the dissent in *Hickman*, lower courts should first determine whether

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<sup>161</sup> See *Lopez*, 514 U.S. at 564; Merritt, *supra* note 10, at 712.

<sup>162</sup> See *Lopez*, 514 U.S. at 559-561; *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting); see also *supra* notes 35-38 and accompanying text.

<sup>163</sup> See *Lopez*, 514 U.S. at 559-61; see also *supra* notes 35-38 and accompanying text.

<sup>164</sup> See *supra* note 39-41 and accompanying text.

<sup>165</sup> See *supra* notes 42-44 and accompanying text.

<sup>166</sup> See *supra* notes 36-37 and accompanying text.

<sup>167</sup> See *Lopez*, 514 U.S. at 561-62; *Hickman*, 179 F.3d at 240-41 (Higginbotham, J., dissenting); see also *supra* notes 48-50 and accompanying text.

<sup>168</sup> See *supra* notes 48-50 and accompanying text.

the extortion or robbery in question was commercial in nature.<sup>169</sup> Based on the legislative history of the 1934 Act and the Hobbs Act, only organized conspiracies to commit crimes of extortion or robbery by organized criminal gangs may be considered commercial in nature.<sup>170</sup> Congressional findings illustrate that extortion and highway robbery by organized gangs has a substantial effect on interstate commerce and the Hobbs Act was passed, in part, in response to the inability of state authorities to alleviate this barrier to free trade.<sup>171</sup> The legislative findings regarding such conduct sufficiently demonstrate a rational basis for concluding that such activity, in the aggregate, has a substantial effect on interstate commerce.<sup>172</sup> Thus, the de minimis effect of individual instances of the activity is of no consequence and the aggregate effect of the class of activity may be considered in determining the validity of a prosecution under the Hobbs Act.<sup>173</sup>

The limited scope of activities subject to prosecution under the Hobbs Act that may be considered commercial in nature is further supported by the fact that the Hobbs Act intrudes on an area of traditional state sovereignty.<sup>174</sup> The Hobbs Act is a federal criminal statute and, according to the Court in *Lopez*, the states possess primary authority for defining and enforcing criminal law.<sup>175</sup> Although all crime is arguably economically motivated, to hold that all extortion and robbery is commercial in nature in order to support the finding of a "substantial effect" on interstate commerce converts congressional authority under the Commerce Clause to a general police power.<sup>176</sup> According to the Court in *Lopez*, such a federal police power violates our federal system of government.<sup>177</sup>

If the extortion or robbery in question was not committed by an organized criminal gang, and, based on the legislative history, there-

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<sup>169</sup> See *Lopez*, 514 U.S. at 559-61; *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting).

<sup>170</sup> See *supra* notes 59-75 and accompanying text.

<sup>171</sup> See *supra* notes 59-75 and accompanying text.

<sup>172</sup> See *supra* notes 59-75 and accompanying text; see also *Lopez*, 514 U.S. at 562-63. Although Congress is not required to make formal findings, the Court reasoned that to the extent such findings would have enabled the Court to evaluate the merits of the regulated activity as commercial in nature, even though no such substantial effect was plainly evident, they were lacking here. See *id.*

<sup>173</sup> See *Lopez*, 514 U.S. at 558 (citation omitted).

<sup>174</sup> See *supra* notes 42-44 and accompanying text.

<sup>175</sup> See *supra* notes 42-44 and accompanying text.

<sup>176</sup> See *supra* notes 42-44 and accompanying text.

<sup>177</sup> See *supra* notes 42-44 and accompanying text.

fore may not be considered commercial in nature, under the second part of the inquiry adopted in *Lopez* and advocated by the dissent in *Hickman*, the lower courts should determine whether the individual extortion or robbery had a "substantial effect" on interstate commerce.<sup>178</sup> Although the Hobbs Act includes a jurisdictional element and is therefore facially valid, lower courts must determine whether the Hobbs Act, as applied, is constitutional.<sup>179</sup> According to the Court in *Lopez*, to satisfy the jurisdictional element of the Hobbs Act, the government must make a case-by-case showing that the individual extortion or robbery in question had a "substantial effect" on interstate commerce.<sup>180</sup>

Despite the clear mandate of *Lopez*, many circuit courts have upheld the Hobbs Act as constitutional under the Commerce Clause although the activity in question was not commercial in nature and the individual crimes committed themselves did not have a substantial effect on interstate commerce.<sup>181</sup> In fact, the Hobbs Act has been extended to potentially federalize any convenience store holdup, granting the federal government a "general police power" which the Court in *Lopez* expressly rejected.<sup>182</sup> For example, in *Arena*, the Second Circuit said that *Lopez* "did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution" and that the government only need demonstrate a de minimis effect upon commerce.<sup>183</sup> Although there was no evidence of organized criminal gang activity that supported a finding that the activity in question was commercial in nature, the court held that a de minimis effect on interstate commerce was sufficient to uphold the conviction under the Hobbs Act.<sup>184</sup> The court reasoned that the Hobbs Act prohibited conduct if it affects commerce "in any way or degree" and the burden of proving a nexus to interstate commerce is therefore de minimis.<sup>185</sup>

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<sup>178</sup> See *Lopez*, 514 U.S. at 561-62; *Hickman*, 179 F.3d at 240-41 (Higginbotham, J., dissenting); see also *supra* notes 48-50 and accompanying text.

<sup>179</sup> See *supra* notes 48-50 and accompanying text.

<sup>180</sup> See *Lopez*, 514 U.S. at 559, 567; see also St. Laurent, *supra* note 13, at 63, 95, 105. To allow for aggregation of the effects of all robberies would result in a general federal police power. See St. Laurent, *supra* note 13, at 95. The Hobbs Act would thus federalize the robbery of every Mom and Pop store that buys coffee, spices or fruit from out of state—that is all of them. See *id.* at 107.

<sup>181</sup> See *supra* notes 96-155 and accompanying text.

<sup>182</sup> See *Lopez*, 514 U.S. at 567-68; St. Laurent, *supra* note 13, at 95.

<sup>183</sup> See *Arena*, 180 F.3d at 390; see also *supra* notes 96-102 and accompanying text.

<sup>184</sup> See *supra* notes 96-102 and accompanying text.

<sup>185</sup> See *supra* notes 96-102 and accompanying text.

Likewise, in *Harrington*, the D.C. Circuit held that a robbery in which \$34 was stolen and the victimized restaurant sustained lost profits of \$1000 satisfied the jurisdictional element of the Hobbs Act because the crime had an "explicit" and "concrete" effect on interstate commerce.<sup>186</sup> The court asserted that *Lopez* required a showing of a "substantial effect" on interstate commerce only when applied to purely intrastate commercial activity.<sup>187</sup> The court found that the \$1000 forfeited by the victimized restaurant due to its forced closing after the robbery would have been transferred to a bank in another state, and therefore, a "concrete" effect on interstate commerce had been shown.<sup>188</sup>

Applying the two-step inquiry adopted in *Lopez* and advocated by the dissent in *Hickman*, however, the above Hobbs Act convictions appear to be unconstitutional.<sup>189</sup> Under the first part of the inquiry, no evidence was brought to show that organized criminal gangs conducted any of the crimes in question and, therefore, that the activity in question was commercial in nature.<sup>190</sup> The legislative history of the 1934 Act and the Hobbs Act regarding racketeering by organized criminal gangs is sufficient to demonstrate a rational basis for concluding that such activity, in the aggregate, has a substantial effect on interstate commerce.<sup>191</sup> Nothing in the legislative history of the 1934 Act and the Hobbs Act, however, supports a finding that purely local crimes such as the ones involved in the above cases have a substantial effect on interstate commerce.<sup>192</sup> Moreover, in the absence of legislative judgment to the contrary, our system of federal government supports the requirement that the government show as part of its case-in-chief that purely local crimes, not committed by organized criminal gangs, have a "substantial effect" on interstate commerce.<sup>193</sup> Criminal law is an area of traditional state sovereignty and, under the police power, states retain primary authority for defining and enforcing

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<sup>186</sup> See *supra* notes 123-133 and accompanying text.

<sup>187</sup> See *supra* notes 123-133 and accompanying text.

<sup>188</sup> See *supra* notes 123-133 and accompanying text.

<sup>189</sup> See *Lopez*, 514 U.S. at 559-62; *Hickman*, 179 F.3d at 231, 240-41 (Higginbotham, J., dissenting); see also *supra* notes 51-54 and accompanying text.

<sup>190</sup> See *supra* notes 96-155 and accompanying text.

<sup>191</sup> See *Lopez*, 514 U.S. at 562-63; see also *supra* notes 59-75 and accompanying text.

<sup>192</sup> See *Hickman*, 179 F.3d at 244 (DeMoss, J., specially dissenting).

<sup>193</sup> See *Lopez*, 514 U.S. at 561 n.3. Although Congress has the power under the Commerce Clause to regulate commercial activities, and this power will at times affect areas of state sovereignty, that authority does not include the power to take over entire areas of traditional state concern. See *id.* at 565-66; see also *id.* at 577 (Kennedy, J., concurring).

criminal law.<sup>194</sup> Finally, the determination that extortion and robbery not committed by organized criminal gangs is not commercial activity is supported by the Justice Department's original construction of the Hobbs Act.<sup>195</sup> According to the Justice Department's original interpretation of the statute, the Hobbs Act applies only to instances involving organized crime, gang activity or wide-ranging criminal activity that has a substantial effect on commerce.<sup>196</sup>

Therefore, under the second part of the inquiry adopted in *Lopez* and advocated by the dissent in *Hickman*, the government should have been required to show that the individual crimes in the above cases had a "substantial effect" on interstate commerce.<sup>197</sup> In relying on the de minimis standard to uphold the convictions under the Hobbs Act, the *Arena* and *Harrington* courts ignored the holding in *Lopez* that, within the third prong of Congress's commerce power, "consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."<sup>198</sup> For example, in *Arena*, the court held that the jury was properly instructed that only a de minimis effect on interstate commerce must be shown to convict under the Hobbs Act.<sup>199</sup> The court reasoned that the jury was entitled to infer from the evidence that some patients of the facilities were from out of state and that the attacks affected the facilities' purchases of supplies in interstate commerce.<sup>200</sup> Thus, according to the court, a de minimis effect on interstate commerce had been shown.<sup>201</sup>

Likewise, in *Harrington*, the court held that the jury was properly instructed that conduct which "in any manner or to any degree" interferes with interstate commerce satisfies the jurisdictional element of the Hobbs Act.<sup>202</sup> The court found that the robbery removed \$30

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<sup>194</sup> See *Lopez*, 514 U.S. at 561 n.3, 565-66; see also *id.* at 583 (Kennedy J., concurring).

<sup>195</sup> See *McLeese*, *supra* note 1, at 14-15, (citing DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, tit. 9, § 131.040).

<sup>196</sup> See *id.*

<sup>197</sup> See *Lopez*, 514 U.S. at 561-62; *Hickman*, 179 F.3d at 240-41 (Higginbotham, J., dissenting); see also *supra* notes 48-50 and accompanying text.

<sup>198</sup> See *Lopez*, 514 U.S. at 559.

<sup>199</sup> See *Arena*, 180 F.3d at 389-90, 391.

<sup>200</sup> See *id.* at 391.

<sup>201</sup> See *id.*

<sup>202</sup> See *Harrington*, 108 F.3d at 1468-69. The court instructed the jury regarding the interstate nexus element of the Hobbs Act as follows: "The term obstructs, delays or affects interstate commerce means any action which in any manner or to any degree interferes with, changes or alters the movement or transportation or flow of goods, merchandise, money or other property in interstate commerce." See *id.* at 1469.



from the restaurant's cash receipts and prevented another several hundred dollars from coming in, and that this money would have been deposited in an out-of-state bank and subsequently used for the purchase of supplies from interstate commerce.<sup>203</sup> According to the court, this evidence was sufficient to support the jury's conclusion that the defendant's conduct had the requisite effect on interstate commerce.<sup>204</sup> The court reasoned that the victimized restaurant was a commercial entity engaged in interstate commerce and, therefore, the loss of cash receipts had a "concrete" and "explicit" effect on interstate commerce.<sup>205</sup>

In addition to misinterpreting the clear holding of *Lopez*, by relying on the de minimis standard, the *Arena* and *Harrington* courts failed to consider that almost all criminal activity affects interstate commerce in at least a de minimis way.<sup>206</sup> Thus, the de minimis standard is inappropriate for extortion and robbery not committed by organized criminal gangs because it would recognize a congressional power to regulate every act of extortion or robbery.<sup>207</sup> The Hobbs Act, however, was not intended to "federalize the robbery of every Mom and Pop restaurant that buys coffee, spices, or fruit from out of state."<sup>208</sup> In fact, the Court in *Lopez* expressly rejected such limitless powers of Congress under the Commerce Clause.<sup>209</sup> Specifically, the Court in *Lopez* held that the federal government is one of limited powers, and that Congress does not have a general police power.<sup>210</sup> The Supreme Court explained that it would not construe the Commerce Clause so as to convert the constitutional congressional authority to a general police power.<sup>211</sup> Rather, the Supreme Court concluded that Congress's power is limited to the regulation of those activities having a substantial relation to interstate commerce—those activities that substantially affect interstate commerce.<sup>212</sup>

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<sup>203</sup> See *id.* at 1469.

<sup>204</sup> See *id.*

<sup>205</sup> See *id.* at 1465, 1470.

<sup>206</sup> See *Hickman*, 179 F.3d at 232 (Higginbotham, J., dissenting); St. Laurent, *supra* note 13, at 63.

<sup>207</sup> See St. Laurent, *supra* note 13, at 63.

<sup>208</sup> See *Harrington*, 108 F.3d at 1473 (Sentelle, J., dissenting).

<sup>209</sup> See *Lopez*, 514 U.S. at 567-68.

<sup>210</sup> See *id.* at 552, 561 n.3.

<sup>211</sup> See *id.* at 567.

<sup>212</sup> See *id.* at 558-59.

## CONCLUSION

"The reason for the law is its soul; when the reason for the law changes, the law changes as well."<sup>213</sup> In order to return to the intended soul of the Hobbs Act, the two-step approach to jurisdictional challenges set forth in *Lopez* and advocated by the Fifth Circuit dissent in *Hickman*, should be adopted by the lower courts. This approach ensures the preservation of our government's first principle—that the Federal Government is one of enumerated powers.<sup>214</sup> Under this approach, convictions under the Hobbs Act for extortion or robbery committed by organized criminal gangs should withstand jurisdictional challenges based on the aggregate effect of such extortion and robbery on interstate commerce. The legislative record of the Hobbs Act supports such aggregation because such economic activity has been held by Congress to have a detrimental effect on interstate commerce. Alternatively, to successfully prosecute extortion or robbery that does not involve organized criminal gangs under the Hobbs Act, the government should be required to prove as part of its case-in-chief that the individual instance had a "substantial effect" on interstate commerce. By requiring the government to meet the "substantial effects" test set forth above, the lower courts will ensure that a traditional area of state sovereignty is not invaded. Thus, the constitutionally mandated division of authority, adopted by the Framers to ensure the protection of our fundamental liberties, will be maintained.

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<sup>213</sup> See Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, DUKE L.J. 511, 515 (1989).

<sup>214</sup> See *Lopez*, 514 U.S. at 552.